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AUTHOR Statsky, William P.
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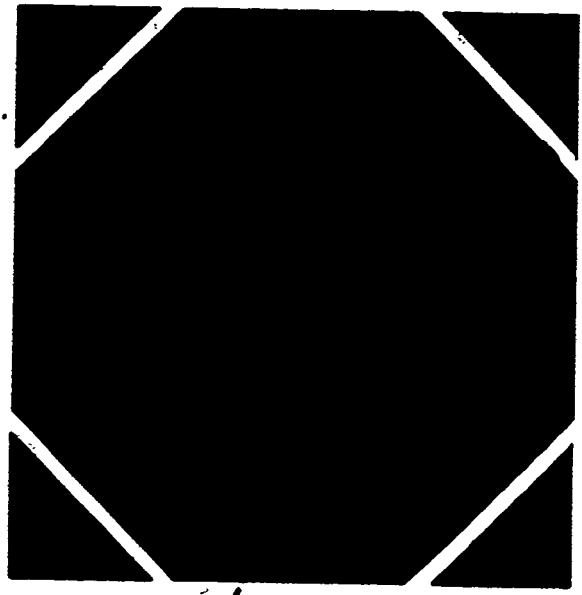
ABSTRACT

Part of the curriculum materials prepared by the National Paralegal Institute under a Federal grant, the manual introduces the paralegal, or legal assistant, to investigation techniques in a law office. Chapter 1 asks the reader to reflect upon fact gathering by examining 12 hypothetical situations. Chapter 2 is introductory and presents a number of basic conceptions about investigation. The remaining seven chapters are directed to specific skills involved in investigation for a law office: Fact Analysis--Organizing the Options, Real vs. Manipulated Versions of Facts--Putting Words into Someone Else's Mouth, Sources of Evidence/Sources of Leads, Gaining Access to Records, Evaluating Testimonial and Physical Evidence, Interviewing Witnesses Generally, and Special Investigative Problems--Some Starting Points. A chart for fact analysis; guidelines for gaining access to records; checklists on sources of evidence and leads, validity of testimonial evidence, and validity of physical evidence; and a selected bibliography on investigation are included. (EA)



Investigation in a Law Office: A Manual for Paralegals

by
William P. Statsky
Professor of Law
Antioch School of Law

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CHARTS AND CHECKLISTS ENCLOSED

CHAPTER ONE

COLLECTING YOUR THOUGHTS ABOUT INVESTIGATION AT THE OUTSET

Investigation is fact gathering. Before examining investigation in detail, you should take the opportunity to reflect upon what you already know about fact gathering. What follows are twelve hypotheticals involving Tom. Some of them deal with his home life while others stem from his employment as a paralegal. Before studying the remaining sections of this text, proceed along the following lines:

a) Read each hypothetical carefully.

b) As to each hypothetical, make notes to answer the following questions:

   (i) If you were Tom, what specific things would you definitely not do to deal with the situation?

   (ii) Make a specific list of the things that you would do.

c) From all of the lists that you have made in response to these hypotheticals, organize a four-to-ten page manual on

investigation. In your lists, you have written down concrete things that Tom should or should not do. Now generalize it all into principles or guidelines of investigation. Don't just draw up another list, however. Be sure that your manual is so organized so that if you showed it to a stranger or to a member of your family, they would know what you are trying to do, and would be able to understand clearly what your views on investigation are.

d) When you have completed studying this text, come back to the manual that you have written. Has your perspective changed? If you had to write the manual over again, would you change any of it?

e) When you are on the job as a paralegal and have had some investigation assignments, go back again to the manual that you wrote. Has your perspective changed? If you had to write the manual over again, would you change any of it?

1. *On September 1st, Tom decides that he wants to enter a Community College. School opens in five days. There are only two colleges that still allow*

time for registration. Both are about the same distance from his home and he can afford both. Tom's problem is that he doesn't know enough about either college to make a decision. He works full-time from 9-6 and must continue to work right up to the first day of school in order to be able to finance his education.

2. Tom teaches a second-grade class. It is the end of the school day on Friday and the bus is in front of the school ready to take about 1/2 his class home. If the students are not out in time for the bus, it will leave without them. It is 2:50 p.m. and the bus is scheduled to leave at 3:05 p.m. Tom discovers that his brief case is missing from the top of his desk.

3. Tom lives in Brooklyn. He has been interested in a job opening twenty miles away in New Jersey. On July 1st, he spoke to the personnel manager to talk about the job and arrange for a personal interview at 3 p.m. on July 24th in New Jersey. When Tom arrives on that date, he is told by the receptionist that the job is no longer open. On July 23rd, the Board of Directors fired the

top administrative staff. The assistant personnel manager made a decision to postpone hiring any new line staff and told the receptionist not to take any new applications. The receptionist interpreted this to mean that there are no more job openings and this is what she tells Tom. In fact, the personnel manager, with whom Tom originally spoke, did not intend to cancel Tom's appointment. Yet Tom is flatly told that there are no longer any openings and that there is no one there to see him.

4. Tom is the father of two children, Ed and Bill. He comes home one day and finds a small package of marijuana in the front hall. He immediately suspects one of his two sons and turns right around and goes out to look for his sons.

5. In the above situation, Tom finds Ed and Bill. They deny any knowledge of the "grass." When the all get back home, they find another bag of marijuana in another room. They also discover that the house had been burglarized. Ed says "maybe the burglars dropped the stuff."

6. Tom's son Bill has been accused of using abusive language in front of his teacher. Tom calls the teacher who refuses to talk about it. The teacher refers Tom to the principal. The principal refuses to talk about it and refers Tom to the Assistant Superintendent at the central office.

7. Tom's sister is ill. She received a letter from a local supermarket where she often buys goods on credit. The letter informs her that she owes $157.27 and that unless she pays within a week, "legal proceedings will be instituted" against her. She calls Tom and tells him that she paid the bill last week. She asks Tom to help her.

8. Tom works for a local legal service office. The office has a client who wants to sue her landlord because the kitchen roof is falling down. Tom is asked to go to inspect the premises.

9. In the same situation as the above, Tom arrives at the client's apartment to inspect the ceiling. While talking to the client she tells him that her daughter has not been home for three days; that her welfare check has not arrived for two months and that her husband beats her.

10. A welfare department has told a client that they are going to terminate public assistance because the client's boy friend is supporting her and her family. The client denies this. Tom is assigned to the case.

11. A client has been to the office seeking help in obtaining a divorce. She claimed that her husband beat her. Several weeks later, the office attorney asks Tom to make a visit to the client's home to see if he can't come up with some information on this charge. Tom visits the client but when he begins to ask her if she has any proof of the beatings, she gets insulted.

12. Tom is in the field at the apartment of a client who claims that she is being billed for an electric refrigerator that she never ordered and that she never received. Tom decides to get two letters: (a) a letter from the apartment owner that the apartment is not wired for electricity and (b) a letter from another merchant stating that the client bought a refrigerator from him one year ago. Is Tom using good investigative techniques?

13. Sam owes Tom $1,000.00. When Tom asks for his money, Sam tells him that he is broke. Tom suspects differently.

14. *Tom's uncle used to live in Boston. After spending two years in the Army, he started traveling across the country. He has not been heard from for five years. Tom wants to locate his uncle.*

CHAPTER TWO.

INTRODUCTION TO INVESTIGATION.

There are a number of basic conceptions about investigation that we should look at before examining the specific skills involved in investigation for a law office.

1. Investigative techniques are often very individualistic.

Styles, mannerisms, approaches and techniques of investigation can be highly personal. This is usually due to the fact that for most investigative assignments, the investigator works alone. A law office usually may have one or two full time investigators if it has any at all. This situation tends to encourage the investigator to rely heavily on his wits and to develop approaches to problem solving that are peculiar to him. Through a long period of on-the-job experience, he has settled upon approaches with which he is comfortable. This is not to say, however, that investigation is such an individualistic skill that it is impossible to identify general guidelines and principles of investigation. It is possible to define helpful generalizations.

2. It is difficult, if not impossible, to replace the principle of trial and error.

A helpful generalization, of course, is quite different from a practice that works. Knowing the general principle, however, can pave the way to developing a technique that works. All generalizations and principles are invalid for any one individual until he has tried it out and found it effective. The process of testing principles and trying out techniques is the process of trial and error. The generalizations will be derived from two sources. First, a course on investigation will attempt to define the generic concepts of investigation that have broad applicability. Second, an investigator on the job will naturally draw conclusions about the effectiveness or ineffectiveness of what he does in the field. These conclusions become, formally or informally, his own manual of investigative principles.

3. It is impossible to substitute principle for hustle, imagination and flexibility.

If there is one characteristic that singles out the effective investigator, it is the willingness to dig. While many investigation assignments may be relatively easy, (e.g., going out to photograph the ceiling of a bathroom which a tenant claims is falling down), most assignments are open-ended in that the range of options and possible conclusions to a problem is extensive. The answer is not there for the asking. As to such assignments, the investigator must be prepared to identify and pursue leads, to be unorthodox, to let his feelings, hunches and

intuition lead him where they will. In short, the principles must give way to hustle and flexibility.

Good investigators are always in pursuit. They are on the offensive and don't wait for the facts to come to them. They know that leg work is required. They know that 50% of their leads will become dead ends. They are not frightened at roadblocks and therefore won't freeze at the first hurdle. They know that there are no perfect ways of getting information. They know that they must take a stab at possibilities and that it takes persistent thinking and imagination to come up with the possibilities. At the same time, good investigators are not fools. They don't pursue blind alleys. After being on the job for a while, they have developed "a feel" for what is or is not a reasonable possibility or lead. They have been able to develop this "feel," however, only because when they first started investigating, they had an open mind and were not afraid to try things out. It is almost always true that when an investigator comes back from the field and says "I couldn't find anything," he has probably not done a thorough job.

4. An investigator may not know what he is looking for until he finds it.

As with legal interviewing,[1] legal research[2] and advocacy generally,[2] good investigation tends to live a life of its own in terms of what it uncovers. There are two kinds of investigation assignments. First, the closed-ended assignment where the end product is carefully defined in advance, e.g., the photograph assignment mentioned above in the tenant case. Second, the open-ended assignment where the investigator begins with only the general contours of a problem and is asked to fill in the facts, e.g., a client has been charged with a burglary and the investigator is assigned to find out as much as he can about the case. In the open-ended assignment (and in some closed-ended ones), the investigator, by definition, is walking into the unknown. He has almost no idea of what he will uncover or fail to uncover. Suppose in the burglary assignment he sets out to focus on whatever is relevant to the burglary charge and in the process discovers that a homicide was involved but is as yet unknown to the police. He had no idea that he would find this

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[1]See Statsky, W., Legal Interviewing for Paralegals (National Paralegal Institute, 1973).

[2]See Statsky, W., Legal Research, Analysis and Writing for Law Students and Paralegals: Some Starting Points (Antioch School of Law & National Paralegal Institute, 1974).

[3]See Statsky, W., Teaching Advocacy: Learner-Focused Training for Paralegals (National Paralegal Institute, 1973 and Statsky, W., "Paralegal Advocacy Before Administrative Agencies: A Training Format," University of Toledo Law Review (1973).

until he found it. Suppose that his office has a client who is charging his employer with racial discrimination, and in the process of working on this case, the investigator discovers that this employee had a managerial job at the company and that several of the workers under this employee have complained that he has practiced racial discrimination against them. Again, the investigator had no idea that he would uncover this factor until he uncovered it. In short, the key component of an open-ended assignment is again an open mind. This is true even with respect to closed-ended assignments for in the process of carrying them out, he may discover facts or alleged facts that broaden the case, putting him into the open-ended arena.

5. Investigation and Interviewing are closely related.

The interviewer[4] conducting the initial client interview has two responsibilities: identify legal problems and obtain from the client as many facts that are relevant to those problems as possible. The starting point for the investigator is the report prepared by the interviewer on what the client said and what the interviewer perceived to be the problems. It is either clear from this report what the investigation needs are, or they become clear after the investigator and his supervisor have defined them more narrowly.

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[4]See footnote 1 supra.

The investigator should approach the interview report with a healthy skepticism. Thus far, all the office may know is what the client has said, or what the interviewer thinks the client said. The perspective of the office is therefore narrow. Without necessarily distrusting the client's word, the investigator's job is to verify the facts thus far revealed and to determine whether new facts exist that were unknown or improperly identified during the interview. He cannot accept the report at face value. If new facts are revealed, or if the "old" facts are for the first time seen in a context that give them an unexpected meaning, the investigative role has been broadened to that of fact and problem identification. He is not simply verifying what was said in the interview report; he is willing to approach the problem almost as if the office knows nothing about it or as if what the office knows is invalid. By adopting this attitude, the investigator is able to give the case an entirely different direction when the product of his investigation warrants it.

6. The investigator must be guided by goals and priorities.

It is one thing to say that the investigator must be open-minded enough to be receptive to the unexpected and to come up with leads that may not be readily at his fingertips. It is quite another to say that the investigator should start in a void. While he should be suspicious of assignments that are so

defined that they appear to pre-suppose what will be uncovered, he should insist on as much specificity as possible from the supervisor who sends him in the field.

How clear a supervisor is in his own mind about an investigation may vary with each assignment. For example:

a) He has a very definite idea of what he wants.

b) He thinks he knows what he wants, but he is not sure.

c) Whatever conception he has about what he wants, he is not effective in explaining it to the investigator.

d) He has no idea what he wants other than a desire to get as many facts about the case as possible.

It may be that the supervisor has in mind a number of problems and sub-problems. Everyone of them may necessitate several investigation tasks. The above four comments on the relationship between the supervisor and the assignment he delegates may apply in varying degrees to each problem and sub-problem. Hence, the first responsibility of the investigator is to establish communication with his supervisor. With as much clarity as possible, the investigator must determine what the supervisor has in mind. In realizing this objective, the investigator will very often help the supervisor think out the problem and place it in perspective. In this sense, the investigator becomes a sounding board for the supervisor by giving him immediate feed

back on the structure of the assignment and forcing him to take a little extra time to think it through. After the investigator has established some credibility, he should expect the supervisor to be turning to him for guidance on how some field investigation assignments should be structured.

7. There is a close relationship among investigation, negotiation and trial.

There are two ultimate questions that should guide the investigator's inquiry into every fact he is investigating:

a) How will this fact assist or hurt the office in attempting to settle or negotiate the case without a trial?

b) How will this fact assist or hurt the office in presenting the client's case at trial?

A large percentage of legal claims never go to a full trial; they are negotiated in advance.[5] Opposing counsel have a number of bargaining sessions in which attempts will be made to hammer out a settlement that will be acceptable to their clients. Very often they discuss the law that they think will be applicable if the case goes to trial. Even more often, they present each other with the facts that they think they will be able to establish at trial. Here the investigator's report becomes invaluable. As a

[5]See Statsky, W., Introduction to Litigation: Roles for the Paralegal (National Paralegal Institute, 1974).

result of this report, the attorney should be able to suggest (e.g., "we have reason to believe...," or "we are now pursuing leads that would tend to establish that...") a wide range of facts that could be used at trial. His bargaining leverage is immeasurably increased by a thorough investigation report.

There are instances when the paralegal will be negotiating himself. This occurs when an administrative agency is involved that permits laymen to represent clients before it.[6] In such cases the paralegal may be doing his own investigation in conjunction with the negotiation and advocacy.

For the cases that are about to go to trial, the significance of the investigation report cannot be overstated. Some of the ways in which it can help the attorney are as follows:

a) deciding whether or not to go to trial at all;

b) deciding what witnesses to call;

c) deciding what questions to ask of witnesses;

d) deciding how to impeach (i.e., contradict or attack the credibility of) opposing witnesses;

e) deciding what tangible or physical evidence to introduce;

f) deciding how to attack the tangible or physical evidence the other side will introduce.

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[6]See Statsky, W., Ethics, the Authorized and Unauthorized Practice of Law for Paralegals: Cases Materials and Questions (National Paralegal Institute, 1974).

Again, for administrative agency cases where paralegals are authorized to represent clients at hearings, the same benefits of comprehensive fact investigation listed above for trials apply to the agency hearings.

For the investigator to be able to assist his attorney-supervisor at trial, he should be familiar with the standard, formal fact-finding devices of depositions and interrogatories. These devices are called discovery procedures. A deposition is a question and answer session before trial conducted outside of court, usually in one of the attorneys' offices. The attorney asks questions of the other party or of a witness of the other party in an effort to obtain facts that will assist him in preparing for trial. Depositions are usually transcribed so that typed copies of the session are available. The same objective exists with the use of interrogatories except that the questions and answers are submitted in writing rather than in person. An interrogatory is simply a written question. The paralegal may have roles to play in this discovery process, e.g., help draft the questions to be submitted as interrogatories or summarize a deposition transcript.

The investigator should always read the questions and answers in the interrogatories as well as the deposition transcript for a number of reasons:

a) to look for names, addresses or incidents that could become leads for his future field investigation;

b) to cross-check some of the facts he has found in the field with what has been said in the interrogatories or deposition.

If the investigator has done some preliminary field work before the interrogatories have been sent out or before the depositions are taken, what he uncovers in the field can be of great value to the attorney in structuring the questions for the interrogatories and depositions that are planned.

8. The investigator must be able to distinguish between "absolute proof of a fact" and "some evidence of a fact."

The investigator must not confuse his role with that of a judge or jury in deciding what the truth is or is not. His function is to identify reasonable options or fact possibilities. To be sure, he can speculate to himself as to whether a judge or jury would ever believe a fact to be true or not. The danger of such speculation, however, is that it will be engaged in regularly at the expense of coming up with options. The tests that an investigator should apply in determining whether to pursue a fact possibility are:

a) Am I reasonable in assuming that a particular fact will help to establish the case of the client?

b) Am I reasonable in assuming that I can gather enough evidence on such a fact that a judge, jury or hearing officer might accept it as true?

c) Am I reasonable in assuming that a particular fact will help to challenge or discredit the case of the opposing party?

d) Am I reasonable in assuming that I can gather enough evidence on such a fact (i.e., which will challenge or discredit the case of the other side) that a judge, jury or hearing officer might accept it as true?

9. The investigator must know some law.

The investigator does not have to be an expert in every area of the law or in any particular area of the law in order to perform his job. For his field work to have a focus, however, he must have at least a general understanding of evidence, civil procedure and the areas of the law covered by the facts of the client's case. He must know, for example, what "hearsay" and "relevance" mean; he must understand what the basic steps in litigation are in order to see where his fact gathering can be used and how it is often used in different ways at different steps in the litigation process. Finally, if the action is a divorce proceeding, he must know what the grounds for divorce are in his particular jurisdiction. The same kind of basic information is needed for every area of the law involved or potentially involved in the client's case. This knowledge is quite different from what the attorney needs to litigate the case. It is an overview understanding which permits the investigator to

give his searchings some structure and direction. He can gain this understanding in a number of ways:

a) Through course work in the law taken before he is on the job;

b) By seeing to it that when his supervisor gives him instructions on the investigation assignments, "pieces" of the law are explained to him in so far as they are relevant to the assignments;

c) By talking to experienced lawyers and paralegals whenever they have time to provide their perspective on the law;

d) By reading a chapter in a hornbook or a law review article which provides an overview in a relevant area of the law.

This is not to say that a paralegal cannot study investigation until he has this overview knowledge. There are a great many general skills of investigation which can be explored now.

10. The investigator must know the territory.

When the investigator is on the job, it will be important for him to begin acquiring as detailed a knowledge as possible about the makeup of the city, town or state where he will be working. Such knowledge should include:

a) the political structure of the area: who is in power, who is the opposition; in what direction is the political structure headed?

b) the social and cultural structure of the area: are there racial problems; are there ethnic groupings that are diffuse or unified; are there different value systems at play?

c) miscellaneous specific information: if you want to get something done at city hall, whom do you see; does the director of a particular agency have any control over his staff; what agencies have "real" services available; what court clerk is most helpful?

It is usually very difficult for the investigator to acquire this knowledge in any way other than getting out into the field and experiencing it first hand. Others can provide guidance, and often will. In the final analysis, however, the investigator will probably discover that what others tell him is biased and incomplete. He needs to establish his own network of contacts and sources of information. First and foremost, he needs to establish his own credibility in the community. People must get to know and trust him. Simply by announcing himself as an investigator (or by presenting a printed card indicating his title and affiliation) he will not find instant cooperation from the community. He has to earn this cooperation. If he quickly gains a reputation as arrogant, dishonest, opportunist or insensitive, he will quickly find that few people will want to deal with him. An investigator could find himself in no worse predicament.

Often the best way to learn about an area and to begin establishing contacts is by being casual and unassuming. Have you ever noticed that insurance salesmen often spend three fourths of their time with you talking about the weather, sports, politics, the high cost of meat etc. before ever getting to their sales pitch? Their approach is to relax you, to find out what interests you, to show you that they are human, and then they hit you with the benefits of buying their insurance. The investigator can learn from this approach not only in establishing contacts at agencies and in the community generally, but also, in dealing with prospective witnesses on specific cases.

11. The investigator can be a problem solver.

The investigator may find himself in a situation where he can play a major role in solving problems so that litigation will not be necessary. In contacting sources of information, for example, the investigator may discover that the client misunderstood what someone said to him. In helping to clear up the misunderstanding, the investigator may be able to facilitate the early disposition of the case.

NOTE

In most states a paralegal does not have to be licensed to be an investigator. California, however, is a state that does license some investigators. Examine the following sections in a chapter from the Business and Professions Code of the California Codes Annotated. Would a paralegal working for a law firm as a full time investigator have to be licensed under the sections of this chapter?

Section 7520

No person shall engage in a business regulated by this chapter; act or assume to act as; or represent himself to be a licensee unless he is licensed under this chapter; and no person shall falsely represent that he is employed by a licensee.

Section 7521

(a) A private investigator within the meaning of this chapter is a person other than an insurance adjuster who, for any consideration whatsoever engages in business or accepts employment to furnish, or agrees to make, or makes, any investigation for the purpose of obtaining information with reference to:

Crime or wrongs done or threatened against the United States of America or any state or territory of the United States of America; the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character

of any person; the location, disposition, or recovery of lost or stolen property; the cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or to property; or securing evidence to be used before any court, board, officer, or investigating committee.

. . . .

Section 7522

This chapter does not apply to:

(a) A person employed exclusively and regularly by one employer in connection with the affairs of such employer only and where there exists an employer-employee relationship.

(b) An officer or employee of the United States of America, or of this state or a political subdivision thereof, while such officer or employee is engaged in the performance of his official duties; including a peace officer in part-time private patrol employment, provided such part-time employment does not exceed 50 hours in any calendar month.

(c) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating of persons.

. . . .

(f) An attorney at law in performing his duties as such attorney at law.

(g) A licensed collection agency or an employee thereof while acting within the scope of his employment, while making an investigation incidental to the business of the agency, including an investigation of the location of a debtor or his property, where the contract with an assignor creditor is for the collection of claims owed or due or asserted to be owed or due or the equivalent thereof.

(h) Admitted insurers and agents and insurance brokers licensed by the state, performing duties in connection with insurance transacted by them.

. . . .

(k) A person engaged solely in the business of securing information about persons or property from public records.

CHAPTER THREE

FACT ANALYSIS: ORGANIZING THE OPTIONS

The process described in this section of structuring or organizing the fact options available in any given case may appear to be complex and cumbersome at first glance. The point to be remembered is that the process, once learned (and modified to suit particular needs) can become second nature to an investigator once he has understood it, tried it out, evaluated it and found it helpful. It is, of course, perfectly proper to adopt another process that is found to be more effective. Whatever method is used, there is a great need for the investigator to develop the discipline of fact analysis as soon as possible.

There are a number of fundamental characteristics of facts that should be understood:

a) Events take place.

b) Events mean different things to different people.

c) Different people, therefore, have different versions of events.

d) Inconsistent versions of the same event to not necessarily indicate fraud or lying.

e) Although someone's version may claim to be the total picture, it may only contain a piece of the picture.

f) When someone is giving a version of an event, he usually mixes statements of why the event occurred with statements of what occurred.

g) Whenever it is claimed that an event has occurred in a certain way, one can logically expect that certain signs, indications or traces (i.e., evidence) of the event can be found.

Given these truisms, the investigator should analyze the facts before him along the lines indicated in the chart on the following page.

FACT ANALYSIS IN INVESTIGATION

STARTING POINT

All the facts you presently have on the case.

PROCEDURE

1. Arrange the facts chronologically.
2. Place a number before each indivudal fact that needs to be established in a legal proceeding and that might be in dispute.

AS TO EACH FACT

VERSION I: The client's

VERSION II: The opponent's (as revealed or as assumed)

VERSION III: A witnesses'

VERSION IV: A witnesses'

VERSION V: Your own

VERSION VI: Any other reasonable version

1. State precisely (with quotes) what the version is.
2. State the evidence or indications that tend to support the version according to the person presenting the version.
3. Determine how you will check out or verify whether these indications exist.
4. Make a list of all the indications that you think should logically exist if the version under examination were true.
5. Determine how you will check out or verify whether the items on your list exist.

It is not inconceivable for a single client's case to have twenty or thirty individual facts that are in dispute. Nor is it unlikely that facts will change, or that people's versions of facts will change in the middle of a case. As to each new or modified fact the same comprehensive process of fact analysis needs to be applied.

To obtain the different versions of a fact may sometimes be difficult. The differences may not be clear on the surface. Of course, every fact will not necessarily have different versions. It is recommended, however, that the investigator assume there will be more than one version until he has demonstrated otherwise to himself. Undoubtedly, he will have to do some probing in order to uncover the versions that exist. Better to do so now than to be confronted with a surprise version at trial or at the agency hearing.

People will not always be willing to share their accounts or versions of facts with the investigator. If he is not successful in convincing them (or in manipulating them) to tell their story, he may have to make some assumptions of what their story is likely to be and to check them out.

CHAPTER FOUR

REAL VS. MANIPULATED VERSIONS OF FACTS: PUTTING WORDS INTO SOMEONE ELSE'S MOUTH

Lest the investigator deceive himself, it should be pointed out that he is not a mere newspaper reporter or a photographer who simply reports on what he sees, hears and smells. He has a much more dynamic role. In a very significant sense he sometimes has the power of "controlling" what someone else says about the facts. This can have its negative and positive consequences.

At its worst, this can mean that the investigator is not listening to the person, or is questioning him in such a manner that he is putting words into the person's mouth. The primary technique that can bring about this result is the leading question.[7] A leading question is a pressure question, one that contains (or suggests) the answer in the statement of the question. For example, "You were in Baltimore at the time, isn't that correct?" "You earn over $200 a week?" "Would it be correct for me to say that when you drove up to the curb you didn't see the light?"

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[7] See Statsky, Legal Interviewing, supra note 1 at p. 47.

Another technique of manipulating someone's answer to your question is by including a premise in your question which has yet to be established. It takes an astute person to say to such questions, "I can't answer your question (or it is invalid) because it assumes another fact that I haven't agreed to." In the following examples of questions and answers, the person responding to the question refuses to be trapped by the form of the question:

Q: "How much did it cost you to have your car repaired after the accident?

A: "It's not my car and it wasn't an accident; your client deliberately ran into the car that I borrowed.

Q: "When did you stop beating your wife?"

A: "I never beat my wife!"

Q: "Can you tell me what you saw?"

A: "I didn't see anything; my brother was there and he told me what happened."

The last leading question containing the unestablished premise can be highly detrimental. Suppose the question and answer went as follows:

Q: "Can you tell me what you saw?"

A: "The car was going about 70 mph."

In fact, the person answering the question did not see this himself; his brother told him that a car was traveling at this speed. There are a number of reasons why this person may have failed to tell the investigator that he didn't see anything first hand:

1) Perhaps he didn't hear the word "saw" in the investigator's question.

2) He may have wanted the investigator to think that he saw something himself; he may have wanted to feel important by conveying the impression that he is a special person because he has special information.

3) He may have felt that it was not significant enough to correct the investigator's false impression; he may have thought that the investigator was more interested in what happened than in who saw what happened.

Whatever the reason, the investigator has carelessly put himself in the position of missing a potentially critical fact, namely that the person is only talking from hearsay.

Another way to blur communication is by completely avoiding certain topics and concentrating only on selected topics. If the investigator does not ask questions about certain matters,

intentionally or otherwise, he is likely to end up with a very distorted picture of what the person's version of the facts is. Suppose there was an automobile collision involving Smith and Jones. The investigator's office is representing Jones. The investigator finds a witness who says that he saw the accident. The investigator asks him to describe what he saw. He fails, however, to ask him where he was at the time he saw the collision. In fact, he was sitting in a park over two blocks away and could only see the collision through some shrubbery. The investigator didn't ask questions to uncover this, it wasn't volunteered and, therefore, the investigator walks away with a potentially distorted picture of what light this individual can shed on what took place. This is the same damage that can be done by the use of leading questions--with or without an unestablished premise.

In some instances, these techniques can have beneficial results. First of all a leading question (without the unestablished premise) can help jar someone's memory so that they are better able to recall the facts.. If this individual is constantly in need of leading questions in order to remember, however, the investigator has strong reason to suspect that the person knows little or nothing as opposed to being merely shy or inarticulate and in need of a push now and then.

Suppose that the witness being questioned is not at all cooperative or has a version of the facts that is damaging to the

client of the investigator's office. It may be that the techniques described in this section as normally improper can be used to challenge his version of the facts. A leading question with an unestablished premise, for example, may catch an individual unaware and give the investigator reasonable cause to believe that the person is not telling the truth.

Suppose that the person being questioned is not hostile, but is neutral, or seemingly so. The way in which this individual is questioned may help him to emphasize certain facts as opposed to others. Once he has committed himself to a version of the facts either completely on his own, or with some subtle help from the questioner, there is a chance that he will stick by this version because he doesn't want to appear to be vague or uncertain. An investigator who takes such a course of action, however, must be extremely careful. He is taking certain risks, not because his conduct is illegal or unethical, but because a witness who needs subtle pressuring from the investigator in order to state a version of the facts in a certain way is probably going to be a weak witness at trial or at the agency hearing. On cross-examination, he is likely to fall apart.

CHAPTER FIVE

SOURCES OF EVIDENCE/SOURCES OF LEADS

Evidence is whatever tends to establish the existence of a fact. There can be testimonial evidence (what someone says) and physical evidence (what can be seen or touched). Simply because something is evidence, it does not mean that it is admissible in court or in an agency proceeding. The confession of a defendant for example, is clearly evidence, but it is inadmissible in criminal court if the police obtained it in such a way that it violated the defendant's privilege against self-incrimination. A "lead" is a path to possible evidence. Of course, evidence is often its own lead to other evidence.

On the following page there is a partial checklist containing some of the standard sources of evidence and leads at the disposal of the investigator whether he is trying to locate a missing relative or obtain facts about an insurance claim. The list is not presented in order of any priority.

CHECKLIST ON THE STANDARD SOURCES OF EVIDENCE AND LEADS

1. Statements of the client	2. Documents the client brings with him or can get	3. The attorney for the other side (may be willing to provide information)
4. Attorneys involved with case in the past	5. Interrogatories, depositions and letters requesting information	6. Pleadings (e.g., complaint) filed thus far in the case
7. Newspaper accounts and notices in the media requesting information	8. Records of municipal, state and federal administrative agencies, generally.	9. Business records, (e.g., cancelled receipts)
10. Employment records	11. Photographs	12. Hospital records
13. Informers or the "town gossip"	14. Surveillance of the scene	15. Police reports and law enforcement agencies generally
16. Fingerprints	17. School records	18. Military records
19. Use of alias	20. Bureau of vital statistics and missing persons	21. Court records
22. Office of Politicians	23. Records of Better Business Bureaus & other consumer groups	24. Telephone book and directories of organizations
25. Accounts of eyewitnesses	26. Hearsay accounts	27. Automobile registrar

28. Object to be traced (eg., auto)	29. Telling your problem to a more experienced investigator and asking him if he can think of any leads	30. Credit bureaus[8]
31. Reports of investigative agencies written in the past	32. Resources of public library	33. Associations-trade or otherwise
	34. "Shots in the dark"	

[8] A credit bureau charges a fee for information; it is an investigative agency. The bureau has contacts with retail merchants in an area who report their experience in trade with particular individuals. A bureau may also have other records on such individuals: involvement in litigation, past and present addresses, past and present employers, bank account information. The information that an investigator receives from a credit bureau should only be regarded as a lead; he can rely on the information only when he has thoroughly "checked it out" himself.

CHAPTER SIX

GAINING ACCESS TO RECORDS

It is one thing to say that the investigator should check records for evidence and leads; it is quite another to gain access to these records. There are four categories of records:

1. Those already in the possession of the client or of an individual willing to turn them over to you on request.

2. Those in the possession of a governmental agency or of a private organization and available to anyone in the public.

3. Those in the possession of a governmental agency or of a private organization and available on request to the client only or to the individual who is the subject of the records.

4. Those in the possession of a governmental agency or of a private organization and claimed to be confidential for everyone except in-house staff.

There should obviously be no difficulty in gaining access to the first category of records unless they have been misplaced or lost, in which event the person who once had possession would ask

the source of the records to provide him with another copy. As to records in the latter three categories, the checklist on the following page should provide some guidelines on gaining access to them.

GUIDELINES TO GAINING ACCESS TO RECORDS

1. Write, phone or visit the organization and ask for it directly.[9]
2. Have the client write, phone or visit and ask for it directly.
3. Draft a letter for the client to sign asking for it directly.
4. Have the client sign a form which states that he gives you authority to see any records that pertain to him and that he specifically waives any right to confidentiality that he has with respect to such records.
5. Find out if the opposing party has it, and if so, ask them to send you a copy.
6. Find out if anyone else has it (e.g., a relative of the client, a co-defendant in this or in a prior court case) and ask them if they will provide you with a copy.
7. For records available generally to the public, find out where these records are and go use them.
8. If you meet resistence (fourth category of records) make a basic fairness pitch to the organization as to why you need the records.
9. Find out (via legal research) if there are any statutes, regulations or cases that provide the client, or that arguably provide the client, with the right of access to the records.
10. If the legal research looks even slightly promising, let the organization know that you are (or that your office is) in the process of establishing a legal basis to gain access to the records, and that the office is contemplating the initiation of litigation to finalize the right.

[9] If the record or document is located out of town, it can usually be obtained at minimal cost by writing to the person or organization that has it. If time is of the essence, a phone call or follow up letter may be needed.

11. Solicit the intervention of a politician or of some other respectable and independent person in trying to gain access.

12. If the person who initially turns down the request for access is a line officer, appeal his decision formally or informally to his supervisor and on up the "chain of command" to the person with final authority.[10]

[10] On the "chain of command," see Statsky, W., Teaching Advocacy: Learner-Focused Training for Paralegals, p. 39 (1973).

CHAPTER SEVEN

EVALUATING TESTIMONIAL AND PHYSICAL EVIDENCE

At all times, the investigator must be making value judgments on the utility of the evidence that he comes across. Again, the test is not whether the evidence would be absolute proof of the truth or falsity of a fact. There are a number of tests that should be applied:

1) Is it relevant; does it tend to prove or disprove any fact involved in the case?

2) Is it worth pursuing either because it might be used in court or because it might be a lead to other evidence?

3) Will it involve an inordinate amount of time and energy to pursue, and if so, is its potential worth minimal or substantial?

Generally speaking, the primary tests are imagination in coming up with options and reasonableness in carrying them out. There

are a number of specific criteria that can be used to assist the investigator in assessing the worth of what he has. On the following pages are checklists to be used in determining this worth.

CHECKLIST ON THE VALIDITY OF TESTIMONIAL EVIDENCE

CHECKLIST TO USE IF THE PERSON IS SPEAKING FROM FIRST HAND (EYE WITNESS) INFORMATION	CHECKLIST TO USE IF THE PERSON IS SPEAKING FROM SECOND HAND (HEARSAY) INFORMATION
1. How long ago did it happen? 2. How good is this person's memory? 3. How far from the event was he standing? 4. How good is his sight? 5. What time of day was it and would this affect his vision? 6. What was the weather at the time and would this affect his vision? 7. Was there a lot of commotion at the time and would this affect his vision or his ability to remember? 8. What was he doing immediately before the incident? 9. How old is he? 10. What was the last grade of schooling he completed? 11. What is his reputation in the community for truthfulness? 12. Was he ever convicted of a crime or are any criminal charges now pending against him? 13. Is he an expert in anything? 14. What are his qualifications? 15. Is he related to, does he work for or under, is he friendly with the other side in the litigation? Would it be to this person's benefit, in any way, to see the other side win? 16. Does any physical evidence exist to corroborate what this person is saying?	1. Does this person remember what was told to him by the other person (ie., the declarant) or what he heard him say to someone else? 2. How is he sure that it is exact? 3. Is the declarant available to confirm or deny this hearsay account of what he said? If not, why not? 4. Under what conditions did the declarant allegedly make the statement (eg., was declarant ill)? 5. Is there other hearsay testimony that will corroborate this hearsay? 6. Does any physical evidence exist to corroborate this hearsay? 7. How old is this person; how old is the declarant? 8. What is the educational and employment background of both? 9. Is either of them related to, (work for or under) or friendly with the other side in the litigation? Would it be to the benefit of either of them to see the other side win? 10. Is he willing to sign a statement covering what he has told the investigator? Is he willing to say it in court?

17. Does any hearsay evidence exist to corroborate it?
18. Is he willing to sign a statement covering what he has told the investigator? Is he willing to say it in court?
19. Is he defensive when asked about what he knows
20. Are there any inconsistencies in what he is saying?
21. How does he react when confronted with the inconsistencies? Defensively?
22. Are there any gaps in what he is saying?
23. Does he appear to exaggerate?
24. Does he appear to be hiding or holding anything back?

11. Is he defensive when asked about what he was told by the declarant or what he heard the declarant say to someone else?
12. Are there any inconsistencies in what he is saying?
13. How does he react when confronted with the inconsistencies? Defensively?
14. Are there any gaps in what he is saying?
15. Does he appear to exaggerate?
16. Does he appear to be hiding or holding anything back?
17. What is his reputation?

CHECKLIST ON THE VALIDITY OF PHYSICAL (TANGIBLE) EVIDENCE

CHECKLIST FOR WRITTEN MATERIAL	CHECKLIST FOR NON-WRITTEN MATERIAL
1. Who wrote it? 2. Under what circumstances was it written? 3. Is the original available? If not, why not? 4. Is a copy available? 5. Who is available to testify that the copy is a true story? 6. Is the author available to testify on what he wrote? If not, why not? 7. Is there any hearsay testimony available to corroborate the authenticity of the writing? 8. Is there any other physical evidence avaliable to corroborate the authenticity of the writing? 9. What hearsay or direct testimony or physical evidnece is available to corroborate or contradict what is said in the writing (as opposed to who wrote it)? 10. Can you obtain sample handwriting specimens of the alleged author?	1. Who found it and under what circumstances? 2. Where was it found? 3. Why would it be where it was found? Was it unusual to find it there? 4. Who is available to identify it? 5. What identifying characteristics does it have? 6. Who owns it? Who used it? 7. Who owned it in the past? Who used it in the past? 8. Who made it? 9. What is its purpose? 10. Does it require laboratory analysis? 11. Can you photograph it? 12. Is it stolen? 13. Is there any public record available to trace its history? 14. What facts does it tend to establish? 15. Was it planted where it was found as a decoy? 16. Can you take the item with you?

CHAPTER EIGHT

INTERVIEWING WITNESSES GENERALLY

1. Know what image you are projecting of yourself.

In the minds of many people, an investigator is often involved in serious and dangerous undertakings. What reaction would you have if a stranger introduced himself to you as an "investigator"? Would you be guarded and very suspicious? The investigator may not want to call himself an investigator at all. He may want to say "My name is_____, I work for (name of law office) and we are trying to get some information on_____." On the other hand, he may find that he is most effective when he is direct and straight forward. Can you think of different people who would respond more readily to certain images of investigators? The following is a partial list of some of the images that an investigator could be projecting by his dress, mannerisms, approach and language:

A professional.

Someone who is just doing a job.

Someone who is emotionally involved in what he is doing.

A friend.

A manipulator or opportunist.

A salesman.

A wise man.

An innocent and shy person.

In sum, the investigator must be aware of (1) his own need to project himself in a certain way, (2) the way in which he thinks he is projecting himself, (3) the way in which the person to whom he is talking perceives him and, (4) the effect that all of this is having on what he is trying to accomplish.

2. There are five kinds of witnesses: (a) hostile, (b) skeptical, (c) friendly, (d) disinterested or neutral and (e) all of the above.

The hostile witness wants your client to lose; he will try to set up roadblocks in your way. The skeptical witness is not sure who the investigator is or what he wants in spite of the investigator's explanation of his role. He is guarded and unsure of whether he wants to get involved. The friendly witness wants your client to win and will cooperate fully. The disinterested or neutral witness doesn't care who wins. He has information which he will tell to whomever asks.

If the hostile witness is the opposing party who has retained counsel, it is unethical for the investigator to talk

directly with this person without going through his counsel. If the hostile witness is not the represented party but is closely associated with that party, the investigator should check with his supervisor on how, if at all, to attempt to approach such a witness.

The fifth category of witnesses is probably the most accurate. Witnesses are seldom totally hostile, skeptical, friendly or neutral. At different times during the investigation interview, and at the different times throughout the various stages of the case, they may shift from one attitude to another. While it may be helpful to determine what general category a witness fits into, it would be more realistic to view any witness as an individual in a state of flux in terms of what he wants to say and what he is capable of saying.

3. The investigator must make the witness want to talk to him.

The investigator has the sometimes difficult threshold problem of "sizing up" the person from whom he is trying to obtain information. What are some or the states of mind that such a person could have:

a) He may want to feel important, generally,

b) He may want to be congratulated for knowing anything, however insignificant, about the case.

c) He may want absolute assurance from you that he won't get into trouble by talking to you. He shuns away from talk of courts, lawyers and law.

d) He may be willing to talk only after you have given him full assurance that you will never reveal the source of the information he will give you.

e) He may be willing to talk to you only in the presence of his friends.

f) If he knows your client, he may want to be told that you are trying to keep the client out of trouble.

g) He may want the chance to meet you first and then have you go away in order to decide whether he wants to talk to you again.

h) He may not be willing to talk to you until you fulfill some of his needs, e.g., listen to his troubles, help him get a job, act in a fatherly or motherly manner, play subtle, seductive games, etc.

In short the investigator must gain the trust of the individual by assessing his needs and by knowing when he is ready to tell you what he knows. The investigator who takes out his notebook immediately upon introducing himself is probably too insensitive to establish the communication that he needs.

4. The investigator must assess how well the witness would do under direct and cross-examination.

As the witness talks to the investigator, the latter must be asking himself a number of questions:

a) Would he be willing to testify in court? Whatever the answer to this question is now, is this witness likely to change his mind later?

b) Would he be effective on the witness stand?

c) Does he know what he is talking about?

d) Does he have a reputation for integrity, creditability or truthfulness in the community?

e) Is he defensive?

f) Would he know how to say "I'm not sure" or "I don't understand the question," as opposed to giving an answer for the sake of giving an answer and not being embarrassed?

g) When he talks, is he internally consistent?

h) Does he know how to listen as well as talk?

When the investigator thinks that the witness is a potential court room participant, he may try certain techniques to deter-

mine answers to some of the above questions. For example, he may drill the person with very precise questions in order to test his level of irritation and defensiveness.

CHAPTER NINE

SPECIAL INVESTIGATIVE PROBLEMS: SOME STARTING POINTS

1. Judgment Collection

A lawyer could win a money judgment in court, but have great difficulty collecting it later on. An investigator may be asked to assist the law firm in ascertaining the financial strength of a particular individual or corporation against whom the judgment was obtained.

One of the best starting points for such an investigation is government records. The following is a partial list of records available from the county clerk's office or the municipal court:

- real property tax assessments
- personal property tax assessments
- filings made under the Uniform Commercial Code
- federal tax liens
- whether the individual or corporation has been plaintiff or defendant in prior litigation

- whether the subject has inherited any property or money (determined by checking records of Surrogate's Court or whatever court in the jurisdiction that handles inheritance and trust cases)

Such records could reveal a good deal of information on the financial status of the party under investigation.

For corporations, the investigator should also check the records of state and federal government agencies (e.g., Securities and Exchange Commission) with whom the corporation must file periodic reports or disclosures on its activities and finances. He should also check with people who have done business with the corporation (e.g., customers or other creditors) as well as its competitors in the field. These records and contacts could provide good leads.

2. Missing Persons

An investigator may be asked to locate a missing heir, a relative of a client, a person who needs to be served with process in connection with current litigation, etc. A missing person is generally not difficult to locate--unless that person does not

want to be found. The first step is to send a registered letter to the person's last known address with a "return receipt requested" which requests the post office to forward the address to the investigator.[11] Other possible sources for leads:

- former landlord, neighbors, postman, local merchants in area of last known address
- local credit bureau
- police department, hospitals
- relatives
- references listed on employment applications
- naturalization certificate, marriage record, drivers license, car registration
- ad in the newspaper

[11] See "Checklist on the Standard Sources of Evidence and Leads," supra p. 35.

3. Background Investigations

On the following pages there is a form used by a large Manhattan investigation firm for its general background investigations on individuals. The first part of the form seeks information that goes to the identification of the subject. The antecedent data covers prior history.

BACKGROUND INVESTIGATIONS

IDENTIFICATION OF SUBJECT

1. Complete name_____Age____SS#_____

Marital status_____wife's name; pertinent info_____

_____

children's names and ages_____

_____

_____

2. CURRENT RESIDENCE ADDRESS AND TYPE OF NEIGHBORHOOD_____

_____

_____

OWN OR RENT_____LOCAL INFORMANTS _____

_____

_____

_____

HOW LONG AT PRESENT ADDRESS-PRIOR RESIDENCE INFO_____

_____

_____

3. BUSINESS AFFILIATION AND ADDRESS, POSITION, TYPE OF BUS._____

_____

_____

_____

ANTECEDENT HISTORY

1. PLACE & DATE OF BIRTH _____

PARENTS' NAMES & OCCUPATIONS _____

WHERE DID THEY SPEND THEIR YOUTH? _____

2. EDUCATION - WHERE, WHICH SCHOOLS, DATES OF ATTENDANCE _____

DEGREE? WHAT KIND? _____ ANY OTHER INFO PERTAINING TO SCHOLASTIC ACHIEVEMENT, EXTRA CURRIC. ACTIVITIES _____

3. FIRST EMPLOYERS TO PRESENT - F/T or P/T, POSITION OR TITLE, JOB DESCRIPTION, EXACT DATES OF EMPLOYMENT, WOULD THEY REHIRE? TYPE OF COMPANY _____

4. RELATIONSHIP WITH PEERS, SUPERVISORS, SUBORDINATES - WHERE DO HIS ABILITIES LIE...-ANY OUTSIDE ACTIVITIES, HONESTY, TRUSTWORTHINESS, INTEGRITY...DOES HE WORK WELL UNDER PRESSURE...ANY DEROGATORY? IF SO, WHAT ARE DETAILS?....REASONS FOR LEAVING...WOULD THEY REHIRE? ...SALARIES...HEALTH...REPUTATION...RELIABILITY...JOB UNDERSTANDING ...WILLINGNESS TO ACCEPT RESPONSIBILITY...._____

_____

_____

_____

_____

_____

IF SELF-EMPLOYED--WHAT WAS THE NATURE OF THE BUSINESS...WITH WHOM DID HE DEAL?...CORP. NAME?..._____

DATE & PLACE OF INCORPORATION_____

WHO WERE PARTNERS, IF ANY?_____

WHAT % OF STOCK DID SUBJ. OWN?_____WAS BUSINESS SUCCESSFUL?_____

WHAT HAPPENED TO IT?_____

IF SOLD, TO WHO?_____ANY SUBSID. OR AFFILIATES?_____

_____

_____

5. WHAT IS HIS CHARACTER OR PERSONALITY LIKE? DID INFORMED KNOW HIM PERSONALLY?_____

HOBBIES?_____

FAMILY LIFE?_____

EVEN TEMPERED?_____LONER OR JOINER?_____INTROVERTED, EXTROVERTED?_____WRITTEN OR ORAL ABILITIES?_____

DOES INFORMED KNOW ANYONE ELSE WHO KNOWS SUBJ?_____

6. CREDIT_____

7. LITIGATION_____CIVIL_____CRIMINAL_____BANKRUPTCY_____

STATE_____FEDERAL_____LOCAL_____

8. BANKING-FINANCIAL.....BANK_____

TYPES OF ACCOUNTS-AVERAGE BAL._____

HOW LONG HAVE THEY HAD ACCOUNTS_____ANY COMPANY ACCOUNTS?_____

IS HE PERSONALLY KNOWN TO OFFICERS OF THE BANK?_____

_____ANY BORROWING?_____SECURED OR UNSECURED?_____

IF SECURED, BY WHAT?_____

DO THEY HAVE FINANCIAL STATEMENT ON THE SUBJ?_____

WHAT IS HIS NET WORTH?_____OTHER ASSETS...REAL ESTATE_____

_____STOCKS_____EQUITY IN HIS CO., ETC._____

QUESTIONS

Which of the following statement do you agree or disagree with? For those statements that you are unsatisfied with, how would you modify them to reflect your own view?

1. Investigation is a separate profession.

2. There is a great difference between investigation conducted by the police and that conducted by a paralegal working for a law office.

3. An investigator is an advocate.

4. It is impossible for the investigator to keep from showing his own personal biases while in the field investigating.

5. There is often a need for a separate investigation to verify the work of another investigation.

6. A good investigator will probably be unable to describe why he is effective. There are too many intangibles involved.

7. It's a good idea for an investigator to specialize in one area of the law, e.g., automobile

negligence cases.

9. If someone is willing to talk to and cooperate with an investigator, there is reason to suspect that this person is trying to manipulate the investigator.

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